

S.No.124

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRM-M-30350 of 2018 (O&M)
Date of Decision:02.08.2018**

Sudesh and others Petitioners

Vs.

State of Haryana and anotherRespondents

CORAM:- HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present:- Mr. Raman Chawla, Advocate
 for the petitioners.

Rajbir Sehrawat, J.(Oral)

The present petition has been filed challenging the order dated 23.04.2018 (Annexure P.7) passed by the Sub Divisional Judicial Magistrate, Tosham whereby the application under Section 319 Cr.P.C for summoning of the accused as additional accused in FIR in question was allowed; as well as revisional order dated 12.06.2018 (Annexure P.8) passed by the learned Additional Sessions Judge, Bhiwani whereby revision petition against the original order was dismissed.

The brief facts as involved in the case are that the petitioner No.2 was working as a Peon in the Bank. When she was about to retire, on the recommendation of one of the co-employees, her son, namely, Satpal was employed in service in the Bank keeping in view his computer knowledge. He was given the work of accepting deposits from the customers and to disburse the amount upto Rs.10,000/- to the customers. Satpal continued to work in the Bank. However, the petitioner No.2, her mother retired from the service in the Bank. Subsequently, one of the

customers came to the Bank to withdraw the amount of Rs.1,90,000/-. When the Manager of the Bank was in the process of approving that withdrawal, it was discovered that this amount has already been withdrawn from the account of the said customer. When the customer raised the dispute, the said Satpal took her on one side and told her that her husband had withdrawn that amount and that he would ensure that the amount reaches to that customer. As per the allegations, Satpal later on made the payment of Rs.1.90 lakhs to that customer. But this led to an inquiry from the side of the Bank. During the inquiry, it was found that the accused Satpal had committed fraud with the accounts of several customers. The *modus operandi* adopted by the said Satpal was that he used to take deposits from the customers. Besides this, he used to transfer money from account to account, without any authority of the customers. In this process, he transferred the amounts from the account of the other customers to the accounts of the present petitioners, who happen to be his wife, mother and Bhabhi, respectively. Those amounts were subsequently, withdrawn from the accounts of the present petitioners in quick successions. The Bank reported the matter to the Police. By that time, an amount of Rs.31 lakhs had been found to have been embezzled by Satpal; through the account of the present petitioners. However, it was stated that the further investigation qua the further frauds by Satpal was still going on.

The Police investigated the matter. However, the challan was not filed against the present petitioners. Thereafter, examination of the prosecution witnesses was started. The prosecution examined three

witnesses. The Manager of the Bank, namely, Dinesh Katpalia was examined as PW3. He named all the three petitioners as the persons; who are holders of the accounts and through whose accounts, the money was drained out through the fraud committed by said Satpal. Besides making statement, this witness also produced Ex.P.15 to Ex.P44 showing the transactions from the accounts of the present petitioners. Besides this, other record of the Bank was also submitted by this witness. However, counsel for the petitioners has now intimated the Court that this witness stands expired; after having been examined in examination-in-chief.

After above said evidence was led by the prosecution then an application under Section 319 Cr.P.C was moved for summoning the petitioners as additional accused to face the trial along with the above said Satpal. The application moved by the prosecution was allowed by the trial Court vide order dated 23.04.2018. Against that order passed by the trial Court, the revision was filed by the present petitioners. However, that revision was also dismissed by the Revisional Court. Hence, the present petition has been filed.

Learned counsel for the petitioners has argued that since the petitioners were exonerated during the investigation by the Police, therefore, the bald statement made by PW3 is not sufficient to summon the present petitioners as the accused to face the trial under Section 319 Cr.P.C. Moreover, the statement made by the witness PW3 is the same version as was given to the Police. Counsel further submits that in fact the petitioners have never withdrawn any amount and they have never visited the Bank.

Further, the counsel has submitted that the test to be applied by the trial Court for summoning a person as an accused under Section 319 Cr.P.C is that there must be material on the basis of which the Court can arrive at a satisfaction qua the involvement of the petitioners more than the degree of satisfaction required for framing of the charge. The counsel further submits that PW3 has since expired, therefore, the testimony of that witness cannot be taken into consideration and, hence, there is no evidence against the present petitioners, even if they are to be tried along with the main accused. The counsel for the petitioners has relied upon the judgments of the Hon'ble Supreme Court rendered in **Brijendra Singh and others v. State of Rajasthan, 2017(3) R.C.R. (Criminal) 374; Brindaban Das and others v. State of West Bengal, 2009(1) R.C.R. (Criminal) 672; Michael Machado and another v. Central Bureau of Investigation and another, 2000(2) R.C.R. (Criminal) 75** and **Brijendra Singh and others v. State of Rajasthan, 2017(3) R.C.R. (Criminal) 374.**

Having heard learned counsel for the petitioners, this Court does not find itself in agreement with the argument raised by learned counsel for the petitioners. As per the order passed by the Courts below, it is not the statement of the witness only which formed the basis of the order. There are the documents also which have been placed on record in the form of Ex.P.15 to Ex.P.44. Therefore, to say that the Courts below have summoned the petitioners on the bald statement of the said witness PW3 is neither factually correct nor legally sustainable.

The argument of the learned counsel for the petitioners that the

same version was given in the FIR, as is given in the statement before the Court, and pursuant to that version, the Police had exonerated the petitioners during investigation, therefore, the petitioners could not be summoned under Section 319 Cr.P.C is not sustainable in law. Merely because the Investigation Agency has chosen not to present a challan against a person is no ground for not summoning a person under Section 319 of Cr.P.C. It is the satisfaction of the trial Court which is material at the stage of summoning of a person under Section 319 Cr.P.C and not the satisfaction of the Investigation Agency. The Hon'ble Supreme Court as well as this Court in ample number of judgments, has held that merely because a person is not challaned by the Police, in itself is not the ground for not summoning the accused or for challenging the order where the accused has been summoned under Section 319 Cr.P.C. Hence, this argument of the learned counsel for the petitioners also deserves to be rejected.

The next argument of the learned counsel for the petitioners that the petitioners have never visited the Bank, therefore, there is no occasion for them to have committed any offence, is more in the nature of defence; which the petitioners would be at liberty to take during the trial. At the stage of consideration under Section 319 Cr.P.C, the defence of the accused is not even to be considered by the Court. It is only with reference to the material available before the Court that the satisfaction of the trial Court is to be arrived at. Hence, merely because an accused can take a defence on a particular point; is not a ground to challenge the order passed

by the Court under Section 319 Cr.P.C.

So far as the test to be applied for summoning of an accused under Section 319 Cr.P.C is concerned, there is no dispute on the proposition that the test to be applied by the trial Court for summoning a person under Section 319 Cr.P.C is the test of a degree of satisfaction of the trial Court qua the involvement of the accused; which is more in degree than the satisfaction of the trial Court which is required for framing of charge against an accused but less than the degree of satisfaction required for conviction of an accused, assuming that the evidence goes unrebutted. The Hon'ble Supreme in the case of **Hardeep Singh Vs. State of Punjab and others, 2014(1) R.C.R. (Criminal) 623** have laid down the test as given below:-

“99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the

words “for which such person could be tried together with the accused.” The words used are not ‘for which such person could be convicted’. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C to form any opinion as to the guilt of the accused.”

A bare perusal of the order passed by the trial Court shows that the trial Court has not faulted in application of the test laid down by the Supreme Court to the facts of the present case. The trial Court has taken into consideration the statement of the witness examined before the Court as well as the documents showing that huge amounts were transferred to the accounts of the present petitioners, there were quick and sequential withdrawal from these accounts; the main accused Satpal is their immediate family member and that there is nothing in record to show that the petitioners ever raised any objections to the operations of their accounts in such manner. If on the basis of this evidence, the trial Court has arrived at a satisfaction that there is material to prima facie presume that the petitioners might have committed the offence alleged against them, then it cannot be said to be a perverse satisfaction. The same has also been upheld by the Revisional Court. Needless to say that Section 319 Cr.P.C only gives a discretion to the trial Court to summon the additional accused and does not cast any mandatory duty upon it, therefore, it is the ‘satisfaction’ of the trial Court on this aspect which is material. Of course, the Revisional Court is entitled to look into the ‘legality’ and ‘propriety’ of the order passed by the trial Court. However, subject to this revisional aspect, it is the satisfaction

of the trial Court which have to prevail for the purpose of Section 319 of Cr.P.C. Any Higher Court cannot substitute its own satisfaction qua the requirement of summoning of an accused on the basis of any 're-appreciation' of the material available before the trial Court. The judgments cited by the learned counsel for the petitioners are clearly distinguishable on the facts of the present case.

So far as the present petition is concerned, this petition has been filed for invoking power of the High Court under Section 482 Cr.P.C. A bare perusal of Section 482 Cr.P.C shows that the power under Section 482 Cr.P.C can be invoked for three purposes, namely, for giving effect to the orders passed under this Court, for preventing the abuse of the process of the Court and to meet the ends of justice. In the present case, the prayer of the petitioners is not for giving any effect to any order passed by the Court. Therefore, the first eventuality prescribed under Section 482 Cr.P.C is not at all attracted. Still further, by any means, an order passed by a Court of competent jurisdiction and continuation thereof; cannot be branded as an abuse of the process of Court; unless it is alleged and shown to the High Court that the Courts below had acted for irrelevant reasons or for extraneous considerations. Needless to say that sufficiency of reasons is not to be gone into after the revisional Court. It is not even the allegation of the petitioners in this case that orders are passed by Court below; for irrelevant or extraneous considerations. So far as the third ingredient of Section 482 Cr.P.C is concerned, this Court is not supposed to go into 'legality' and 'propriety' of the order passed by the trial Court. Section 397(3) of Cr.P.C

prohibits second revision by a party. Under Section 397(1), the Revisional Court is authorised to see 'legality' and 'propriety' of the order passed by the Court. Since second revision by the same party is prohibited under Section 397(3), therefore, any argument on 'legality' or 'propriety' of an order passed by the Court below, ordinarily, is not to be appreciated in proceedings under Section 482 Cr.P.C, unless it is shown, at the macro level, that such an order has resulted from considerations which were totally alien to the process of the Court or have produced incomprehensibly absurd result and, therefore, have resulted in defeating the ends of justice itself. What cannot be done directly, cannot be done indirectly as well. In the present case, except to argue for re-appreciation of the material before the trial Court, there is not even a submission or an allegation regarding any aberration in the process adopted by the Courts for passing the impugned orders. Therefore, power under Section 482 Cr.P.C cannot be exercised by this Court to re-appreciate the same material, which was available before the Courts below and which have been duly appreciated by the Courts below.

Learned counsel for the petitioners has further argued that since the witness has expired after deposition in examination-in-chief, therefore, that witness would not be available for examination-in-chief again; or for cross-examination by the petitioners, therefore, it would be a case of no evidence against the petitioners. However, even this argument is not worth acceptance. Section 33 of the Indian Evidence Act contains specific provision to this effect that if a person has expired after deposing before the Court, then the statement of such a witness shall be a relevant testimony in

the same proceedings. The proviso to this Section is applicable only qua the subsequent proceedings and not to the subsequent stage of the same proceedings. Besides this, there are documents also on record; which are being claimed by the prosecution to corroborate and to establish the case against the petitioners.

In view of the above, finding no merit in the present petition, the same is dismissed.

August 02, 2018
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(RAJBIR SEHRAWAT)
JUDGE

Whether Speaking/reasoned	Yes/No
Whether Reportable	Yes/No